

1992

Janet R. (Cox) Rex v. K. Norman Cox : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

JANET R. (COX) REX,

Plaintiff/Appellant,

-vs-

K. NORMAN COX,

Defendant/Appellee.

REPLY BRIEF

Case No. 92-0818

Trial Court No. 904402060

Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE JUDGMENT AND DECREE OF DIVORCE ENTERED
BY THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, ON OR ABOUT OCTOBER 28, 1992, THE
HONORABLE LYNN W. DAVIS PRESIDING.

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Utah Court of Appeals

SEP 13 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JANET R. (COX) REX,

Plaintiff/Appellant,

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-vs-

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TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES..... | ii |
| SUMMARY OF ARGUMENT..... | 1 |
| DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES..... | 2 |
| ARGUMENT..... | 2 |
| POINT I: THERE IS NO STIPULATION OF RECORD FOR THIS CASE..... | 2 |
| POINT II: THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD THE PLAINTIFF ONE- HALF THE OREM RESIDENCE..... | 4 |
| POINT III:THE TRIAL COURT ERRED IN FAILING TO AWARD THE PLAINTIFF ALIMONY..... | 10 |
| POINT IV: THE TRIAL COURT ERRED IN ORDERING THE PLAINTIFF TO PAY ATTORNEY'S TO THE DEFENDANT..... | 15 |
| POINT V: DEFENDANT SHOULD BE ORDERED TO PAY PLAINTIFF'S ATTORNEY'S FEES IN THIS APPEAL..... | 16 |
| CONCLUSION..... | 17 |
| CERTIFICATE OF SERVICE..... | 18 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-------|
| <u>Bell v. Bell</u> , 810 P.2d, 489 (Ut. App., 1991)..... | 16 |
| <u>Berman v. Berman</u> , 749 P.2d, 1271 (Ut. App., 1988)..... | 8 |
| <u>Boyle v. Boyle</u> , 735 P.2d, 669 (Ut. App., 1987)..... | 12 |
| <u>Crouse v. Crouse</u> , 817 P.2d, 836 (Ut. App., 1991)..... | 16 |
| <u>Hogue v. Hogue</u> , 831 P.2d, 120 (Ut. App., 1992)..... | 11 |
| <u>Jones v. Jones</u> , 700 P.2d, 1072 (Ut. 1985)..... | 10,12 |
| <u>Morgan v. Morgan</u> , 854 P.2d, 559 (Ut. App., 1993)..... | 4 |
| <u>Naranjo v. Naranjo</u> , 751 P.2d, 1144 (Ut. App., 1988)..... | 12 |
| <u>Osguthorpe v. Osguthorpe</u> , 791 P.2d, 895 (Ut. App., 1990)..... | 11 |
| <u>Rappleye v. Rappleye</u> , 855 P.2d, 260 (Ut. App., 1993)..... | 12 |

Rules

| | |
|---|------|
| <u>Utah Rules of Civil Procedure</u> , Rule 68..... | 2,15 |
|---|------|

Statutes

| | |
|--|-------|
| <u>Utah Code Annotated</u> , §30-3-3 (1989 as amended)..... | 15,16 |
| <u>Utah Code Annotated</u> , §35-4-4(c) (1991 as amended)..... | 11 |

IN THE UTAH COURT OF APPEALS

JANET R. COX,

Plaintiff/Appellant,

-vs-

K. NORMAN COX,

Defendant/Appellee.

REPLY BRIEF

Case No. 92-0818

Trial Court No. 904402060

Priority Classification 15

REPLY BRIEF OF APPELLANT

PLAINTIFF/APPELLANT (hereinafter "plaintiff" or "wife") submits the following as her Reply Brief in the above-entitled matter:

SUMMARY OF THE ARGUMENT

1. There is no stipulation on file with the trial court, either as an exhibit, as a part of the record, or as a written pleading. Therefore, to the extent that the defendant's argument in his brief relies upon a stipulation of the parties, no such stipulation appears of record. Because there is no stipulation of record, the trial court's findings are inadequate, and the matter must be remanded for adequate findings.

2. The trial court's distribution of assets was so inequitable as to constitute an abuse of discretion. Specifically, the court should have awarded plaintiff one-half the Orem

residence.

3. The failure of the trial court to award plaintiff alimony was an abuse of discretion. The trial court relied upon defendant's bald assertion that he was unable to work for medical reasons, without so much as a medical record or medical report to substantiate his claim, and in the face of a significant employment history.

4. The trial court erred in relying upon Rule 68 of the Utah Rules of Civil Procedure, to award defendant attorney's fees.

5. Plaintiff should be awarded her court costs and attorney's fees in bringing this appeal.

DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

There is no case law authority nor statutory authority believed by plaintiff to be wholly dispositive of the issues on appeal. However, Rule 68 of the Utah Rules of Civil Procedure, may be dispositive of one issue on appeal.

ARGUMENT

POINT I: THERE IS NO STIPULATION OF RECORD FOR SETTLEMENT OF THIS CASE.

Plaintiff, in her opening brief, returned to source documents (such as the premarital contract of the parties) to analyze the case. The defendant, in his brief, relies upon a stipulation which

is putatively of record in this matter. In fact, there is no stipulation of record in this case, other than non-specific references in the transcript to the fact that a stipulation exists. There is no written pleading which is a stipulation on file in this case. There is no exhibit marked and on file in the record in this case containing the stipulation. The stipulation was not made a part of the oral record at the time of trial, so that it would appear as part of the transcript. The stipulation simply does not exist.

To the extent that the stipulation is a basis for the defendant's argument in his brief, his argument is wholly unsupported. To the extent that the trial court's decision in the matters which are the subject of this appeal relies in part on the stipulation forming a foundation for the court's ruling, the court's ruling is wholly unsupported by evidence or by stipulation or by adequate findings.

This case must, therefore, be remanded for the taking of additional evidence, and for specific findings either to support the trial court's assumptions about the stipulation, or to support the finding that a stipulation existed.

**POINT II. THE TRIAL COURT ABUSED ITS DISCRETION
IN FAILING TO AWARD THE PLAINTIFF ONE-
HALF THE OREM RESIDENCE.**

As set forth in plaintiff's opening brief, the circumstances which occurred immediately before and during the marriage of the parties are such that the plaintiff acquired a legal interest in and an equitable interest in the Orem residence. This property interest should have been divided equally between the parties, as of the date of the decree of divorce.

First of all, the trial court erred in dividing the value of the real property as of the date of the parties' separation in 1990, rather than as of the date of the divorce trial in 1992. The court specifically made a finding regarding the value of the Orem property at the time of separation (Finding of Fact No. 13, R.O. A., 212). The court did not at any point value the home as of the date of the divorce. Ordinarily, property must be valued as of the date of divorce. Morgan v. Morgan, 854 P.2d, 559 (Ut. App., 1993). Defendant alleges that plaintiff stipulated to this valuation date, but as noted above, there is no stipulation of record.

Defendant in his brief argues that the trial court properly awarded the Orem residence to the defendant, based upon a number of factors. First of all, defendant argues that the parties "stipulated" that the value of defendant's home prior to marriage and prior to remodeling, was \$77,000.00. This "stipulation" does

not appear in any portion of the record.

Next, defendant argues that the court properly determined that the fair market value of the home at the time of separation was \$105,000.00. As noted above, it was error for the trial court to value the home at the time of separation (1990) rather than at the time of the divorce in 1992.

Next, defendant asserts that plaintiff's sale of her premarital residence and her investment of the proceeds of that sale into the remodeling of the defendant's home should somehow work in favor of the defendant receiving all of the Orem property. In fact, the wife's sale of her premarital residence, and her reinvestment of the net proceeds of that sale into the defendant's home, are factors favoring the validity of the deed which grants plaintiff a legal interest in the Orem property, and favors plaintiff receiving one-half interest in the Orem home.

Defendant claims that the premarital contract of the parties, and the warranty deed from defendant to plaintiff argue against plaintiff's interest in the Orem real estate. In fact, as set forth in plaintiff's brief, defendant executed a warranty deed to plaintiff before he signed the antenuptial agreement. One day later, he then signed the antenuptial agreement which sets forth his net worth in the sum of approximately \$370,000.00, but fails to itemize what assets comprise that net worth. In other words, the

home is not listed as an item making up his net worth for purposes of the antenuptial agreement. There is no stipulation of the parties to contradict the plain meaning of the antenuptial agreement and the warranty deed, read in conjunction with each other. The plain meaning, from the four corners of the two documents, is that plaintiff owned a full undivided one-half interest in the Orem residence. The trial court abused its discretion in failing to uphold the deed, and in failing to award plaintiff one-half the equity in the home as of the date of divorce.

Defendant argues in his brief that he intended the warranty deed to secure only the plaintiff's remodeling expenditures. Had this been defendant's intention, the antenuptial agreement and/or the warranty deed could have addressed this issue specifically. However, the warranty deed does not make any reference to any particular percentage interest or dollar interest being granted to the plaintiff. It simply gives plaintiff an undivided one-half interest in the Orem home. The trial court should not have considered, and this Court should not consider, the defendant's parole evidence contradicting a written contract and written deed, when the plain meaning of the contract and deed are evident from the documents themselves.

Defendant argues at length in his brief that this Court should

analyze the distribution of the Orem residence as though it were premarital property. This is simply not an appropriate analysis under the circumstances of this case. The Orem residence lost its character as premarital property when the defendant executed a warranty deed to the plaintiff prior to the parties' marriage granting to plaintiff an undivided one-half interest in the property. Further, the defendant sealed this bargain when he signed a premarital contract failing to specify that the residence be treated as premarital property. Therefore, all of the defendant's analysis in his brief regarding the supposed premarital character of the Orem real estate is simply not applicable in this case. The Orem home should have been treated as a marital asset.

Defendant, in his brief, attempts to characterize the warranty deed as an "after-thought," as something incompatible with the provisions of the antenuptial agreement. In fact, as has been repeatedly noted by the plaintiff, the warranty deed can be read in a manner totally compatible with the antenuptial agreement. This Court can and should interpret these two documents as compatible, through the following analysis: the parties intended to provide security for the plaintiff, in the face of her sale of her premarital home, and intended to protect plaintiff's substantial investment in the remodeling of the defendant's home. Therefore, defendant deeded a full one-half interest in the home to plaintiff,

before marriage. Thereafter, the parties executed an antenuptial agreement which failed to mention the Orem residence at all, because the Orem residence was not contemplated to be a part of the antenuptial agreement. The antenuptial agreement disposes of all the rest of the defendant's property, and all the rest of the plaintiff's property.

In Berman v. Berman, 749 P.2d, 1271 (Ut. App., 1988), the Utah Court of Appeals held that antenuptial agreements are to be construed and treated in the same manner as other contracts. The ordinary and usual meaning of the words used are to be given effect, and effect is to be given to the entire agreement without ignoring any part of the agreement. If the court gives the antenuptial agreement and the warranty deed, read together, the interpretation proposed above by plaintiff, then the requirements of the Berman decision will be satisfied.

Defendant devotes a substantial portion of his brief to an analysis of the question of whether a warranty deed executed subsequent to an antenuptial agreement abrogates the terms and provisions of the antenuptial agreement. This analysis is all well and good, but it has absolutely no application to the instant case. In the case now at bar, defendant executed the warranty deed before he executed the antenuptial agreement. Thereafter, defendant signed the antenuptial agreement, which also contains plain

language, and does not mention the real property which had earlier been deeded to plaintiff. Therefore, all of defendant's analysis about whether the warranty deed voids the antenuptial agreement is inapplicable to the facts of this case.

Defendant argues in his brief that the antenuptial contract was executed days before the marriage and was prepared in a hurry. This does not affect in any way the enforceability of the agreement. It must still be interpreted according to the plain meaning of its language. Of course, if defendant wishes to claim the contract is void as an adhesion contract or because defendant was under duress when it was executed, plaintiff will stipulate that the contract is void. Then the warranty deed stands alone, granting plaintiff one-half the home.

Defendant seems to think that plaintiff argues the antenuptial agreement is void, due to non-disclosure of assets. (See defendant's brief, page 24.) This is not the case. Plaintiff simply argues that the itemization of defendant's assets does not specify that the house in issue is included within the calculation of defendant's net worth at marriage. This does not void the contract. It makes it possible to read the warranty deed and contract consistently with each other.

In summary, plaintiff should be awarded one-half the Orem house.

**POINT III. THE TRIAL COURT ERRED IN FAILING TO
AWARD THE PLAINTIFF ALIMONY.**

As noted in plaintiff's opening brief, under the three-prong analysis in Jones v. Jones, 700 P.2d, 1072 (Ut. 1985), the plaintiff should receive alimony from the defendant, at least in the sum of \$250.00 per month for three years, to enable plaintiff to retrain.

The trial court specifically found that plaintiff was unable to meet her monthly obligations with her own income, and that she was employed full-time. In order to make ends meet, she was receiving assistance from her parents and from her church. Plaintiff satisfies two of the three requirements for receipt of alimony under Jones. She is in need and she cannot meet her own needs.

The only prong of the Jones analysis which is truly in dispute is the issue of the defendant's ability to contribute to the plaintiff's support. Defendant notes in his brief that he became unemployed in October 1991 (during the pendency of this action) when he sold his business. Defendant asserts in his brief that his only income at the time of trial was \$554.00 per month from unemployment compensation. Further, defendant contended at trial and contends in his brief that he suffers from a physical disability which precludes him from seeking full-time employment in his area of training.

Defendant's arguments to the trial court and to this Court are internally contradictory. He states on the one hand that he is receiving unemployment compensation, which, as a matter of law, requires that he be actively seeking and able to accept full-time employment. Utah Code Annotated, §35-4-4(c) (1991 as amended). In the alternative, he claims to suffer from a physical disability which precludes him from seeking or accepting full-time employment. (See paragraph 9, page 5 of defendant's brief). Defendant cannot have it both ways.

Most importantly, defendant failed to produce at trial any evidence to support his own self-serving and lay opinion that he was physically disabled from employment. He failed to call any physician, or other health care provider, to support his claim. He did not even call a friend or family member to testify on this point. He failed to produce any medical records, medical bills or medical reports to verify his condition.

Plaintiff acknowledges that considerable latitude is given trial courts in making factual determinations and adjusting financial and property interests, and that the trial court's actions are entitled to a presumption of validity. Hogue v. Hogue, 831 P.2d, 120 (Ut. App., 1992); and Osguthorpe v. Osguthorpe, 791 P.2d, 895 (Ut. App., 1990). Plaintiff also acknowledges that this Court will not modify the trial court's determinations unless there

has been a misunderstanding or misapplication of the law, resulting in substantial and prejudicial error, or that the ruling is against the clear weight of the evidence, or that such a serious inequity would result as to manifest the clear abuse of discretion. Naranjo v. Naranjo, 751 P.2d, 1144 (Ut. App., 1988). The trial court's determination to believe the defendant's self-serving and unsubstantiated claims of disability, and its determination to believe defendant had to quit his job and sell his business in the face of a pending divorce trial, manifests a clear abuse of discretion on the part of the trial court within the meaning of the Hogue decision, as to the plaintiff's alimony claim.

The Jones decision does not preclude the court from considering other factors as well as the three factors set forth in Jones. Rappleye v. Rappleye, 855 P.2d, 260 (Ut. App., 1993); and Boyle v. Boyle, 735 P.2d, 669 (Ut. App., 1987). In the instant case, the trial court abused its discretion in failing to consider other relevant factors such as the circumstances in which defendant was left at the time of divorce compared to the circumstances of the plaintiff. Defendant was left with an unencumbered home having a value in excess of \$100,000.00, to satisfy his housing needs. He was left with other assets having a value of more than \$150,000.00. In comparison, the plaintiff was left to obtain housing through the assistance of her parents and her church. She was left with no

assets or cash reserves to sustain herself. Under these circumstances, her request for alimony of \$250.00 per month for a period of three years in which to retrain was eminently reasonable, and the trial court abused its discretion in failing to grant this request.

Defendant asks this court to consider, in relation to the plaintiff's request for alimony, that the defendant had sold his business in October of 1991. Defendant asks this Court to consider that he was "forced" to sell his business "at a substantial loss" approximately one year after the parties' separation. In effect, defendant asks this Court to consider the sale of his business and his resulting financial "loss" at a time subsequent to the separation. Yet he argues, where it is to his advantage, that the home should be valued at the time of separation, about one year prior to the sale of the business. The trial court in fact adopted this approach, valuing the home at the time of the separation, but considering the sale of defendant's business, and his supposed loss incurred as a result of that sale, in making its property distribution and/or alimony award. This argument on the part of the defendant simply highlights the trial court's abuse of discretion, in picking and choosing times at which to value assets or make assessments, unreasonably favoring the defendant.

Defendant argues in his brief, at page 15, that his income was

\$554.00 per month. In fact, in addition to his unemployment income of \$554.00 per month, defendant was receiving \$500.00 per month in contract proceeds from the sale of his business, and he had significant other assets. (Finding of Fact No. 19). After taxes, defendant and plaintiff had substantially similar net monthly incomes. But defendant had his housing free of costs, and had reserves, while plaintiff did not.

Defendant argues in his brief that he experienced a greater decrease in his net worth, in terms of dollars, than did the plaintiff. Defendant may have suffered the loss of more money than the plaintiff during the course of the parties' marriage, but this is because he had so much more to begin with. In terms of a percentage of defendant's assets, defendant suffered only a thirty-five percent loss in his net worth, as opposed to an eighty-five percent loss in plaintiff's net worth during the parties' marriage. Specifically, prior to the marriage, plaintiff had a net worth of \$74,000.00. (Finding of Fact No. 7). At the time of the divorce, plaintiff's net worth was \$10,539.00. (Finding of Fact No. 15). On the other hand, defendant's net worth at the time of marriage was \$368,000.00. (Finding of Fact No. 7). At the time of the divorce, the defendant's net worth was \$232,249.00.

Plaintiff has met her burden of proof to establish that the trial court committed error in failing to award plaintiff alimony.

The matter should be remanded for the trial court to take appropriate findings, and to award plaintiff alimony in the sum of \$250.00 per month for a period of three years.

**POINT IV. THE TRIAL COURT ERRED IN ORDERING
THAT THE PLAINTIFF PAY ATTORNEY'S
FEES TO THE DEFENDANT.**

The trial court ordered plaintiff to pay defendant attorney's fees. As noted in plaintiff's opening brief, the trial court improperly applied Rule 68 of the Utah Rules of Civil Procedure, pertaining to offers of judgment. The lower court assumed that the plaintiff would be responsible to pay attorney's fees pursuant to Rule 68. In fact, Rule 68 would require that plaintiff pay only defendant's costs, not attorney's fees. The trial court made no finding about the defendant's costs in this case, incurred after the date of the offer of judgment, as distinct from his attorney's fees.

Further, the trial court abused its discretion in requiring plaintiff, with a net worth of less than \$11,000.00, and net monthly income of about \$1,100.00, to pay defendant's attorney's fees, when defendant had a net worth of \$232,249.00, and had net monthly income of \$1,054.00 per month, and when defendant had no housing expenses.

In his brief, defendant argues that, pursuant to Utah Code

Annotated, §30-3-3 (1989 as amended), a trial court may award attorney's fees in a divorce proceeding, so long as the award is based on evidence as to the receiving spouse's financial needs, the ability of the paying spouse to pay and the reasonableness of the award. Defendant is correct in this statement about Utah statutory law. However, the trial court made absolutely no findings about any of the factors set forth in Utah Code Annotated, §30-3-3, and specifically stated that the sole basis for its award of attorney's fees was Rule 68. At the very least, this action should be remanded to the trial court for the making of adequate finding as to the issue of attorney's fees. Further, based upon the facts of this case, it was an abuse of discretion to order plaintiff to pay defendant's attorney's fees, even under the requirements of §30-3-3.

**POINT V. DEFENDANT SHOULD BE ORDERED TO PAY
PLAINTIFF'S ATTORNEY'S FEES IN
THIS APPEAL.**

Plaintiff seeks an award of her attorney's fees in this appeal. The trial court has abused its discretion, and committed plain error in the interpretation of Utah law. Plaintiff should be awarded the attorney's fees she has incurred on appeal. Bell v. Bell, 810 P.2d, 489 (Ut. App., 1991), and Crouse v. Crouse, 817 P.2d, 836 (Ut. App., 1991).

CONCLUSION

For the foregoing reasons, the judgment of the trial court in this matter should be reversed. This Court should remand this matter for the following purposes:

1. For the trial court to make a specific finding about the stipulation of the parties, including specifically, the terms of the stipulation; and

2. For entry of a judgment awarding the plaintiff alimony in the sum of a \$250.00 per month for a period of three years, retroactive to October 1992; and

3. For entry of a judgment awarding the plaintiff one-half of the parties' right, title and interest in the Orem residence as of the date of entry of the decree of divorce; and

4. For entry of an order reversing the trial court's previous award of attorney's fees to defendant; and

5. For an order awarding the plaintiff her court costs and attorney's fees incurred in this appeal, in an amount to be determined by the court.

RESPECTFULLY SUBMITTED THIS 13 day of September, 1993.

CORPORON & WILLIAMS



MARY C. CORPORON
Attorney for Defendant/Appellant


CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff/appellant herein, and that I caused the foregoing REPLY BRIEF, to be served upon defendant/appellee by mailing two true and correct copies of the same in an envelope, postage prepaid, and addressed to:

BYRON FISHER
Attorney for Plaintiff/Appellee
Twelfth Floor
215 State, P.O. Box 510210
Salt Lake City, Utah 84151

on the 13 day of September, 1993.

CORPORON & WILLIAMS



MARY C. CORPORON
Attorney for Defendant/Appellant